



**Billing Code: 5001-06**

**DEPARTMENT OF DEFENSE**

**Office of the Secretary**

**2 CFR Part 1108**

**[DOD-2016-OS-0051]**

**RIN 0790-AJ46**

**Definitions for DoD Grant and Agreement Regulations**

**AGENCY:** Office of the Secretary, Department of Defense (DoD).

**ACTION:** Final rule.

**SUMMARY:** This rule is the fifth of a sequence of six final rules published in the *Federal Register* to update the DoD Grant and Agreement Regulations (DoDGARs). Additionally, this rule provides definitions of terms that are common to the DoDGARs and establishes a central regulatory location for each term.

**DATES:** This rule is effective *[insert date 60 days after publication of this rule in the Federal Register]*.

**FOR FURTHER INFORMATION CONTACT:** Barbara Orlando, Basic Research Office, 571-372-6413.

## **SUPPLEMENTARY INFORMATION:**

### **I. Executive Summary**

#### **A. Purpose of the Final Rule**

This final rule incorporates the Office of Management and Budget's (OMB) guidance to Federal agencies on administrative requirements, cost principles, and audit requirements that apply to Federal grants, cooperative agreements, and other assistance instruments (2 CFR part 200). Additionally, this rule provides definitions of terms that are common to the DoDGARs and establishes a central regulatory location for each term.

#### **B. Legal Authorities for the Regulatory Action**

There are two statutory authorities for this rule:

- 10 U.S.C. 113, which establishes the Secretary of Defense as the head of the Department of Defense (DoD); and
- 5 U.S.C. 301, which authorizes the head of an Executive department to prescribe regulations for the governance of that department and the performance of its business.

## **II. Regulatory History**

In December 2014 (79 FR 76047), DoD established an interim implementation of the final guidance, "Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards," published by the Office of Management and Budget (OMB) on December 26, 2013, in 2 CFR part 200 (Uniform Guidance—available at 78 FR 78589). DoD then published a Notice of Proposed Rulemaking (November 7, 2016 (81 FR 78360)) that proposed changes to 2 CFR part 1108, Definitions, that would establish definitions of terms that are common to most portions of those regulations, as well as create a central location for the definitions.

## **III. Comments and Responses**

DoD did not receive public comments in response to the Notice of Proposed Rulemaking that proposed 2 CFR part 1108, Definitions, which was published in the *Federal Register* on November 7, 2016. However, in reviewing the five other rules proposed on that date, which are being published as final rules in today's *Federal Register*, and in developing the yet-to-be-published portions of the updated DoDGARs, DoD identified the need for changes to make corrections and enhance the clarity and currency of this part and its consistency with other parts of the DoDGARs. Therefore, we:

- Added "or agreements" to modify "officer" in 2 CFR 1108.80, Claim.
- Added "Indian tribe" in 2 CFR 1108.85(a), Cognizant agency for indirect costs.
- Added a definition of "cost-type award" at 2 CFR 1108.128 to be parallel to other terms defined in 2 CFR part 1108.
- Added a definition of "prior approval" at 2 CFR 1108.298 to ensure consistent understanding of use of the term.
- Added to the definition of "State" in 2 CFR 1108.350 the qualifier "for purposes of the administrative requirements of these regulations..." for clarity. Although this part already recognizes that a term can be defined differently in a national policy requirement, there also may be instances where an authorizing statute defines the term "State" differently when establishing eligibility for financial assistance.
- Modified the name of appendix A by substituting the term "types of awards" with "types of legal instruments" (i.e., Background on assistance, acquisition, and terms for types of legal instruments) for consistency with the usage in the Federal Grant and Cooperative Agreement Act. Throughout this part, where appropriate, we used the word(s) "instruments" or "legal instruments, in lieu of "awards."

- Eliminated redundancy, e.g., by removing “prime” as a modifier of the defined term “award.”
- Updated language to ensure use of current terminology, e.g., substituted “notice of funding opportunity” for “program announcement” in 2 CFR 1108.405(a), Voluntary (committed or uncommitted) cost sharing.

In addition, we made some minor edits, e.g., changing plural usage to singular where the context warranted it; using defined terms, rather than descriptive language; and substituting language that is consistent with other parts of the DoDGARs.

#### **IV. Regulatory Analyses**

We developed this rule after considering numerous statutes and Executive Orders (E.O.s) related to rulemaking. Below we summarize our analyses based on these statutes or E.O.s.

##### **A. Regulatory Planning and Review**

Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review) direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs

and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated as a "not significant" regulatory action, and not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has not been reviewed by the Office of Management and Budget (OMB) under the requirements of these Executive Orders.

Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs) directs agencies to reduce regulation and control regulatory costs and provides that "for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process." This rule is not subject to the requirements of this Executive Order because it is not significant under Executive Order 12866.

### **Costs**

DoD has found that this rule will not impose costs on the public because this rule is establishing a central regulatory location for definitions in the DoDGARs without imposing additional requirements or burdens on the public.

### **Benefits**

DoD determined that creating a central location for definitions used throughout the DoDGARs will help maximize long term

benefits in relation to costs and burdens for recipients of DoD awards. The public will benefit from all terms being located in one location.

### **Alternatives**

1. No action - If no action was taken, DoD would not be compliant with OMB requirements to move all financial assistance regulations to 2 CFR.
2. Next Best alternative - The next best alternative would be to add additional definitions, beyond those found in the DODGARS, which give background explanations for the terms that are in the DODGARS. While the new definitions may add additional context to the wording in the DODGARS, it would be more beneficial to expand the definition than to direct the public to additional definitions.

### **B. Congressional Review Act (5 U.S.C. § 801, et seq.)**

Under the Congressional Review Act, a major rule may not take effect until at least 60 days after submission to Congress of a report regarding the rule. A major rule is one that would have an annual effect on the economy of \$100 million or more or have certain other impacts. This rule is not a major rule under the Congressional Review Act.

### **C. Impact on Small Entities**

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601-612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. This rule will not impose any impacts on any entities. This means that there will be no economic impacts on any entities. Therefore, the Department of Defense under the Regulatory Flexibility Act<sup>1</sup> certifies that this rule will not have a significant economic impact on a substantial number of small entities.

#### **D. Assistance for Small Entities**

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104-121, we want to assist small entities in understanding this rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance,

---

<sup>1</sup> 5 USC §601 et seq (1980)

please contact the person in the FOR FURTHER INFORMATION CONTACT section of this rule.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business.

#### **E. Unfunded Mandates Reform Act**

The Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531-1538, requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of \$100,000,000 (adjusted for inflation) or more in any 1 year. Although this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

#### **F. Collection of Information**

The Paperwork Reduction Act (PRA) (44 U.S.C. 3501-3520) applies to collections of information using identical questions posed to, or reporting or recordkeeping requirements imposed on, ten

or more members of the public. This rule does not call for a new collection of information under the PRA.

### **G. Federalism**

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. This proposed rule does not have federalism implications that warrant the preparation of a federalism assessment in accordance with Executive Order 13132.

### **List of Subjects in 2 CFR Part 1108**

Accounting, Business and Industry, Cooperative agreements, Grants administration, Hospitals, Indians, Nonprofit organizations, Reporting and recordkeeping requirements, Small business, State and local governments

Accordingly, under the authority of 5 U.S.C. 301 and 10 U.S.C. 113, 2 CFR chapter XI, subchapter A, is amended by adding part 1108 to read as follows:

### **PART 1108—DEFINITIONS OF TERMS USED IN SUBCHAPTERS A THROUGH F**

## **OF THIS CHAPTER**

### **Subpart A-General**

Sec.

- 1108.1 Purpose of this part.
- 1108.2 Precedence of definitions of terms in national policy requirements.
- 1108.3 Definitions of terms used in the Governmentwide cost principles or single audit requirements.
- 1108.4 Definitions of terms that vary depending on context.

### **Subpart B-Definitions**

- 1108.10 Acquire.
- 1108.15 Acquisition.
- 1108.20 Acquisition cost.
- 1108.25 Administrative offset.
- 1108.30 Advance payment.
- 1108.35 Advanced research.
- 1108.40 Agreements officer.
- 1108.45 Applied research.
- 1108.50 Approved budget.
- 1108.55 Assistance.
- 1108.60 Award.
- 1108.65 Award administration office.
- 1108.70 Basic research.
- 1108.75 Capital asset.
- 1108.80 Claim.
- 1108.85 Cognizant agency for indirect costs.
- 1108.90 Contract.
- 1108.95 Contracting activity.
- 1108.100 Contracting officer.
- 1108.105 Contractor.
- 1108.110 Cooperative agreement.
- 1108.115 Co-principal investigator.
- 1108.120 Cost allocation plan.
- 1108.125 Cost sharing or matching.
- 1108.128 Cost-type award.
- 1108.130 Cost-type contract.
- 1108.135 Cost-type subaward.
- 1108.140 Debarment.
- 1108.145 Debt.
- 1108.150 Delinquent debt.
- 1108.155 Development.
- 1108.160 Direct costs.
- 1108.165 DoD Components.

1108.170 Equipment.  
1108.175 Exempt property.  
1108.180 Expenditures.  
1108.185 Federal interest.  
1108.190 Federal share.  
1108.195 Fixed-amount award.  
1108.200 Fixed-amount subaward.  
1108.205 Foreign organization.  
1108.210 Foreign public entity.  
1108.215 Grant.  
1108.220 Grants officer.  
1108.225 Indian tribe.  
1108.230 Indirect costs (also known as "Facilities and Administrative," or F&A, costs).  
1108.235 Institution of higher education.  
1108.240 Intangible property.  
1108.245 Local government.  
1108.250 Management decision.  
1108.255 Nonprocurement instrument.  
1108.260 Nonprofit organization.  
1108.265 Obligation.  
1108.270 Office of Management and Budget.  
1108.275 Outlays.  
1108.280 Participant support costs.  
1108.285 Period of performance.  
1108.290 Personal property.  
1108.295 Principal investigator.  
1108.298 Prior approval  
1108.300 Procurement contract.  
1108.305 Procurement transaction.  
1108.310 Program income.  
1108.315 Project costs.  
1108.320 Property.  
1108.325 Real property.  
1108.330 Recipient.  
1108.335 Research.  
1108.340 Simplified acquisition threshold.  
1108.345 Small award.  
1108.350 State.  
1108.355 Subaward.  
1108.360 Subrecipient.  
1108.365 Supplies.  
1108.370 Suspension.  
1108.375 Technology investment agreement.  
1108.380 Termination.  
1108.385 Third-party in-kind contribution.  
1108.390 Total value.  
1108.395 Unique entity identifier.

1108.400 Unobligated balance.

1108.405 Voluntary (committed or uncommitted) cost sharing.

1108.410 Working capital advance.

Appendix A to Part 1108—Background on Assistance, Acquisition, and Terms for Types of Legal Instruments

Authority: 5 U.S.C. 301 and 10 U.S.C. 113.

## **Subpart A—General**

### **§ 1108.1 Purpose of this part.**

(a) This part provides:

(1) Definitions of terms used in subchapters A through F of this chapter; and

(2) Background information as context for understanding terms related to assistance and acquisition purposes, legal instruments that DoD Components make at the prime tier, and lower-tier transactions into which recipients and subrecipients enter when carrying out programs at lower tiers under DoD awards.

(b) This part is, for DoD, the regulatory implementation of OMB guidance in subpart A of 2 CFR part 200.

### **§1108.2 Precedence of definitions of terms in national policy requirements.**

(a) *General.* Some portions of the DoD Grant and Agreement Regulations (DoDGARs) may use a term in relation to compliance with a national policy requirement in a statute, Executive order, or other source that defines the term differently than it

is defined in subpart B of this part. For purposes of that particular national policy requirement, the definition of a term provided by the source of the requirement and any regulation specifically implementing it takes precedence over the definition in subpart B of this part. Using the definition of a term that takes precedence for each national policy requirement is therefore important when determining the applicability and effect of that requirement.

(b) *Examples.* (1) Current portions of the DoDGARs that specifically implement national policy requirements, as described in paragraph (a) of this section, are:

(i) A Governmentwide regulation currently codified by DoD at 32 CFR part 26, which implements the Drug-Free Workplace Act of 1988 as it applies to grants (41 U.S.C. chapter 81, as amended);

(ii) A Government regulation currently codified by DoD at 32 CFR part 28, which implements restrictions on lobbying in 31 U.S.C. 1352;

(iii) A DoD regulation at part 1125 of this chapter, which implements Governmentwide guidance on nonprocurement debarment and suspension (2 CFR part 180) that has bases both in statute (section 2455 of Public Law 103-355, 108 Stat. 3327) and in Executive orders 12549 and 12689; and

(iv) Part 1122 of this chapter, which provides standard wording of terms and conditions related to a number of national policy requirements.

(2) To illustrate that a term may be defined differently in conjunction with specific national policy requirements than it is in this part, the term "State" is defined differently in the drug-free workplace requirements at 32 CFR part 26, the lobbying restrictions at 32 CFR part 28, and Subpart B of this part.

**§1108.3 Definitions of terms used in the Governmentwide cost principles or single audit requirements.**

(a) Some DoDGARs provisions state that DoD Components or recipients must comply with single audit or cost principles requirements in a Governmentwide issuance that contains defined terms and include the requirements by reference to the issuance without restating them.

(b) For any term in one of those issuances, this part includes the definition of the term only if the DoDGARs also use that term directly.

(c) If the DoDGARs only use the term indirectly, i.e., through the DoDGARs' reference to the issuance, then this part will not include a definition and a user of the DoDGARs should consult definitions in the pertinent Governmentwide source, as follows:

(1) The Single Audit Act requirements for audits of recipients and subrecipients that are in subpart F of OMB guidance in 2 CFR part 200;

(2) The Governmentwide cost principles for institutions of higher education, nonprofit organizations, States, local governments, and Indian tribes that are contained in subpart E of OMB guidance in 2 CFR part 200; and

(3) The cost principles for for-profit entities at Subpart 31.2 of the Federal Acquisition Regulation (FAR) at 48 CFR part 31, as supplemented by provisions of the Defense Federal Acquisition Regulation Supplement at subpart 231.2 of 48 CFR part 231.

#### **§1108.4 Definitions of terms that vary depending on context.**

DoDGARs definitions of some terms related to types of legal instruments (e.g., "contract") and purposes for which they are used (e.g., "procurement" or "acquisition") may vary, depending on the context. Appendix A to this part provides additional information about those terms and their definitions.

#### **Subpart B-Definitions**

##### **§1108.10 Acquire.**

*Acquire* means to:

(a) When the term is used in connection with a DoD Component action at the prime tier, obtain property or services

by purchase, lease, or barter for the direct benefit or use of the United States Government.

(b) When the term is used in connection with a recipient action or a subrecipient action at a tier under a DoD Component's award:

(1) Purchase services;

(2) Obtain property under the award by:

(i) Purchase;

(ii) Construction;

(iii) Fabrication;

(iv) Development;

(v) The recipient's or subrecipient's donation of the property to the project or program under the award to meet a cost-sharing or matching requirement (i.e., including within the entity's share of the award's project costs the value of the remaining life of the property or its fair market value, rather than charging depreciation); or

(vi) Otherwise.

#### **§ 1108.15 Acquisition.**

*Acquisition* means the process of acquiring as described in:

(a) Paragraph (a) of § 1108.10 when used in connection with DoD Component actions at the prime tier.

(b) Paragraph (b) of § 1108.10 when used in connection with recipient or subrecipient actions at a lower tier under a DoD Component's award.

**§1108.20 Acquisition cost.**

*Acquisition cost* means the cost of an asset to a recipient or subrecipient, including the cost to ready the asset for its intended use.

(a) For example, when used in conjunction with:

(1) The purchase of equipment, the term means the net invoice price of the equipment, including the cost of any modifications, attachments, accessories, or auxiliary apparatus necessary to make it usable for the purpose for which it is acquired.

(2) Equipment that a recipient or subrecipient constructs or fabricates--or software that it develops--under an award, the term includes, when capitalized in accordance with generally accepted accounting principles (GAAP):

(i) The construction and fabrication costs of that equipment; and

(ii) The development costs of that software.

(b) Ancillary charges, such as taxes, duty, protective in-transit insurance, freight, and installation may be included in, or excluded from, the acquisition cost in accordance with the recipient's or subrecipient's regular accounting practices.

**§1108.25 Administrative offset.**

*Administrative offset* means an action whereby money payable by the United States Government to, or held by the Government for, a recipient is withheld to satisfy a delinquent debt.

**§1108.30 Advance payment.**

*Advance payment* means a payment that DoD or a recipient or subrecipient makes by any appropriate payment mechanism, including a predetermined payment schedule, before the recipient or subrecipient disburses the funds for project or program purposes.

**§1108.35 Advanced research.**

*Advanced research* means advanced technology development that creates new technology or demonstrates the viability of applying existing technology to new products and processes in a general way. Advanced research is most closely analogous to precompetitive technology development in the commercial sector (i.e., early phases of research and development on which commercial competitors are willing to collaborate, because the work is not so coupled to specific products and processes that the results of the work must be proprietary). It does not include development of military systems and hardware where specific requirements have been defined. It is typically funded in Advanced Technology Development (Budget Activity 3) programs

within DoD's Research, Development, Test and Evaluation (RDT&E) appropriations.

**§1108.40 Agreements officer.**

*Agreements officer* means a DoD official with the authority to enter into, administer, and/or terminate technology investment agreements.

**§1108.45 Applied research.**

*Applied research* means efforts that attempt to determine and exploit the potential of scientific discoveries or improvements in technology, such as new materials, devices, methods and processes. It typically is funded in Applied Research (Budget Activity 2) programs within DoD's Research, Development, Test and Evaluation (RDT&E) appropriations. Applied research often follows basic research but may not be fully distinguishable from the related basic research. The term does not include efforts whose principal aim is the design, development, or testing of specific products, systems or processes to be considered for sale or acquisition, efforts that are within the definition of "development."

**§1108.50 Approved budget.**

*Approved budget* means, in conjunction with a DoD Component award to a recipient, the most recent version of the budget the recipient submitted, and the DoD Component approved (either at the time of the initial award or subsequently), to summarize

planned expenditures for the project or program under the award.

It includes:

(a) All Federal funding made available to the recipient under the award to use for project or program purposes.

(b) Any cost sharing or matching that the recipient is required to provide under the award.

(c) Any options that have been exercised but not any options that have not yet been exercised.

**§1108.55 Assistance.**

*Assistance* means the transfer of a thing of value to a recipient to carry out a public purpose of support or stimulation authorized by a law of the United States (see 31 U.S.C. 6101(3)). Grants, cooperative agreements, and technology investment agreements are examples of legal instruments that DoD Components use to provide assistance.

**§1108.60 Award.**

*Award* means a grant, cooperative agreement, technology investment agreement, or other nonprocurement instrument subject to one or more parts of the DoDGARs. Within each part of the regulations, the term includes only the types of instruments subject to that part.

**§1108.65 Award administration office.**

*Award administration office* means a DoD Component office that performs post-award functions related to the administration

of grants, cooperative agreements, technology investment agreements, or other nonprocurement instruments subject to one or more parts of the DoDGARs.

**§1108.70 Basic research.**

*Basic research* means efforts directed toward increasing knowledge and understanding in science and engineering, rather than the practical application of that knowledge and understanding. It typically is funded within Basic Research (Budget Activity 1) programs within DoD's Research, Development, Test and Evaluation (RDT&E) appropriations. For the purposes of the DoDGARs, basic research includes:

(a) Research-related, science and engineering education and training, including graduate fellowships and research traineeships; and

(b) Research instrumentation and other activities designed to enhance the infrastructure for science and engineering research.

**§1108.75 Capital asset.**

*Capital asset* means a tangible or intangible asset used in operations having a useful life of more than one year which is capitalized in accordance with GAAP. Capital assets include:

(a) Land, buildings (facilities), equipment, and intellectual property (including software) whether acquired by

purchase, construction, manufacture, lease-purchase, exchange, or through capital leases; and

(b) Additions, improvements, modifications, replacements, rearrangements, reinstallations, renovations or alterations to capital assets that materially increase their value or useful life (not ordinary repairs and maintenance).

**§1108.80 Claim.**

*Claim* means a written demand or written assertion by one of the parties to an award seeking as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of an award term or condition, or other relief arising under or relating to the award. A routine request for payment that is not in dispute when submitted is not a claim. The submission may be converted to a claim by written notice to the grants or agreements officer if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

**§1108.85 Cognizant agency for indirect costs.**

*Cognizant agency for indirect costs* means the Federal agency responsible for reviewing, negotiating, and approving cost allocation plans and indirect cost proposals on behalf of all Federal agencies. The cognizant agency for indirect costs for a particular entity may be different than the cognizant agency for audit. The cognizant agency for indirect costs:

(a) For an institution of higher education, nonprofit organization, State, local government, or Indian tribe is assigned as described in the appendices to 2 CFR part 200. See 2 CFR 200.19 for specific citations to those appendices.

(b) For a for-profit entity, normally will be the agency with the largest dollar amount of pertinent business, as described in the Federal Acquisition Regulation at 48 CFR 42.003.

**§1108.90 Contract.**

*Contract* means a procurement transaction, as that term is defined in this subpart. A contract is a transaction into which a recipient or subrecipient enters. It is therefore distinct from the term "procurement contract," which is a transaction that a DoD Component awards at the prime tier.

**§1108.95 Contracting activity.**

*Contracting activity* means an activity to which the Head of a DoD Component has delegated broad authority regarding acquisition functions pursuant to 48 CFR 1.601.

**§1108.100 Contracting officer.**

*Contracting officer* means a DoD official with the authority to enter into, administer, and/or terminate procurement contracts and make related determinations and findings.

**§1108.105 Contractor.**

*Contractor* means an entity to which a recipient or subrecipient awards a procurement transaction (also known as a contract).

**§1108.110 Cooperative agreement.**

*Cooperative agreement* means a legal instrument which, consistent with 31 U.S.C. 6305, is used to enter into the same kind of relationship as a grant (see definition of "grant" in this subpart), except that substantial involvement is expected between DoD and the recipient when carrying out the activity contemplated by the cooperative agreement. The term does not include "cooperative research and development agreements" as defined in 15 U.S.C. 3710a.

**§1108.115 Co-principal investigator.**

*Co-principal investigator* means any one of a group of individuals whom an organization that is carrying out a research project with DoD support designates as sharing the authority and responsibility for leading and directing the research intellectually and logistically, other than the one among the group identified as the primary contact for scientific, technical, and related budgetary matters (see the definition of "principal investigator").

**§1108.120 Cost allocation plan.**

*Cost allocation plan* means either a:

(a) Central service cost allocation plan, as defined at 2 CFR 200.9 and described in Appendix V to 2 CFR part 200; or

(b) Public assistance cost allocation plan as described in Appendix VI to 2 CFR part 200.

**§1108.125 Cost sharing or matching.**

*Cost sharing or matching* means the portion of project costs not borne by the Federal Government, unless a Federal statute authorizes use of any Federal funds for cost sharing or matching.

**§1108.128 Cost type award.**

*Cost-type award* means an award that a DoD Component makes that provides for the recipient to be paid based on the actual, allowable costs it incurs in carrying out the award.

**§1108.130 Cost-type contract.**

*Cost-type contract* means a procurement transaction awarded by a recipient or a subrecipient at any tier under a DoD Component's grant or cooperative agreement that provides for the contractor to be paid on the basis of the actual, allowable costs it incurs (plus any fee or profit for which the contract provides).

**§1108.135 Cost-type subaward.**

*Cost-type subaward* means a subaward that:

(a) A recipient or subrecipient makes to another entity at the next lower tier; and

(b) Provides for payments to the entity that receives the cost-type subaward based on the actual, allowable costs it incurs in carrying out the subaward.

**§1108.140 Debarment.**

*Debarment* means an action taken by a Federal agency debarring official to exclude a person or entity from participating in covered Federal transactions, in accordance with debarment and suspension policies and procedures for:

(a) Nonprocurement instruments, which are in OMB guidance at 2 CFR part 180, as implemented by the DoD at 2 CFR part 1125; or

(b) Procurement contracts, which are in the Federal Acquisition Regulation at 48 CFR 9.4.

**§1108.145 Debt.**

*Debt* means any amount of money or any property owed to a Federal agency by any person, organization, or entity except another United States Federal agency. Debts include any amounts due from insured or guaranteed loans, fees, leases, rents, royalties, services, sales of real or personal property, or overpayments, penalties, damages, interest, fines and forfeitures, and all other claims and similar sources. For the purposes of this chapter, amounts due a non-appropriated fund instrumentality are not debts owed the United States.

**§1108.150 Delinquent debt.**

*Delinquent debt* means a debt:

(a) That the debtor fails to pay by the date specified in the initial written notice from the agency owed the debt, normally within 30 calendar days, unless the debtor makes satisfactory payment arrangements with the agency by that date; and

(b) With respect to which the debtor has elected not to exercise any available appeals or has exhausted all agency appeal processes.

**§1108.155 Development.**

*Development* means, when used in the context of "research and development," the systematic use of scientific and technical knowledge in the design, development, testing, or evaluation of potential new products, processes, or services to meet specific performance requirements or objectives. It includes the functions of design engineering, prototyping, and engineering testing. It typically is funded within programs in Budget Activities 4 through 7 of DoD's Research, Development, Test and Evaluation (RDT&E) appropriations.

**§1108.160 Direct costs.**

*Direct costs* means any costs that are identified specifically with a particular final cost objective, such as an award, in accordance with the applicable cost principles.

**§1108.165 DoD Components.**

*DoD Components* means the Office of the Secretary of Defense; the Military Departments; the National Guard Bureau (NGB); and all Defense Agencies, DoD Field Activities, and other organizational entities within the DoD that are authorized to award or administer grants, cooperative agreements, and other non-procurement instruments subject to the DoDGARs.

**§1108.170 Equipment.**

*Equipment* means tangible personal property (including information technology systems) having a useful life of more than one year and a per-unit acquisition cost which equals or exceeds the lesser of:

- (a) \$5,000; or
- (b) The recipient's or subrecipient's capitalization threshold for financial statement purposes.

**§1108.175 Exempt property.**

(a) *Exempt property* means tangible personal property acquired in whole or in part with Federal funds under a DoD Component's awards, for which the DoD Component:

- (1) Has statutory authority to vest title in recipients (or allow for vesting in subrecipients) without further obligation to the Federal Government or subject to conditions the DoD Component considers appropriate; and
- (2) Elects to use that authority to do so.

(b) An example of exempt property authority is contained in the Federal Grant and Cooperative Agreement Act (31 U.S.C. 6306) for tangible personal property acquired under an award to conduct basic or applied research by a nonprofit institution of higher education or nonprofit organization whose primary purpose is conducting scientific research.

**§1108.180 Expenditures.**

*Expenditures* mean charges made by a recipient or subrecipient to a project or program under an award.

(a) The charges may be reported on a cash or accrual basis, as long as the methodology is disclosed and is consistently applied.

(b) For reports prepared on a cash basis, expenditures are the sum of:

(1) Cash disbursements for direct charges for property and services;

(2) The amount of indirect expense charged;

(3) The value of third-party in-kind contributions applied; and

(4) The amount of cash advance payments and payments made to subrecipients.

(c) For reports prepared on an accrual basis, expenditures are the sum of:

(1) Cash disbursements for direct charges for property and services;

(2) The amount of indirect expense incurred;

(3) The value of third-party in-kind contributions applied; and

(4) The net increase or decrease in the amounts owed by the recipient or subrecipient for:

(i) Goods and other property received;

(ii) Services performed by employees, contractors, subrecipients, and other payees; and

(iii) Programs for which no current services or performance are required, such as annuities, insurance claims, or other benefit payments.

**§1108.185 Federal interest.**

*Federal interest* means, in relation to real property, equipment, or supplies acquired or improved under an award or subaward, the dollar amount that is the product of the:

(a) Federal share of total project costs; and

(b) Current fair market value of the property, improvements, or both, to the extent the costs of acquiring or improving the property were included as project costs.

**§1108.190 Federal share.**

*Federal share* means the portion of the project costs under an award that is paid by Federal funds.

**§1108.195 Fixed-amount award.**

*Fixed-amount award* means a DoD Component grant or cooperative agreement that provides for the recipient to be paid on the basis of performance and results, rather than the actual, allowable costs the recipient incurs.

**§1108.200 Fixed-amount subaward.**

*Fixed-amount subaward* means a subaward:

(a) That a recipient or subrecipient makes to another entity at the next lower tier; and

(b) Under which the total amount to be paid to the other entity is based on performance and results, and not on the actual, allowable costs that entity incurs.

**§1108.205 Foreign organization.**

*Foreign organization* means an entity that is:

(a) A public or private organization that is located in a country other than the United States and its territories and is subject to the laws of the country in which it is located, irrespective of the citizenship of project staff or place of performance;

(b) A private nongovernmental organization located in a country other than the United States and its territories that solicits and receives cash contributions from the general public;

(c) A charitable organization located in a country other than the United States and its territories that is nonprofit and tax exempt under the laws of its country of domicile and operation, and is not a university, college, accredited degree-granting institution of education, private foundation, hospital, organization engaged exclusively in research or scientific activities, church, synagogue, mosque or other similar entity organized primarily for religious purposes; or

(d) An organization located in a country other than the United States and its territories that is not recognized as a foreign public entity.

**§1108.210 Foreign public entity.**

*Foreign public entity* means:

- (a) A foreign government or foreign governmental entity;
- (b) A public international organization, which is an organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act (22 U.S.C. 288-288f);
- (c) An entity owned (in whole or in part) or controlled by a foreign government; or
- (d) Any other entity consisting wholly or partially of one or more foreign governments or foreign governmental entities.

**§1108.215 Grant.**

*Grant* means a legal instrument which, consistent with 31 U.S.C. 6304, is used to enter into a relationship:

(a) Of which the principal purpose is to transfer a thing of value to the recipient to carry out a public purpose of support or stimulation authorized by a law of the United States, rather than to acquire property or services for the DoD's direct benefit or use.

(b) In which substantial involvement is not expected between DoD and the recipient when carrying out the activity contemplated by the award.

**§1108.220 Grants officer.**

*Grants officer* means a DoD official with the authority to enter into, administer, and/or terminate grants or cooperative agreements.

**§1108.225 Indian tribe.**

*Indian tribe* means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. Chapter 33), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians (25 U.S.C. 450b(e)). See the annually published Bureau of Indian Affairs list of Indian Entities Recognized and Eligible to Receive Services.

**§1108.230 Indirect costs (also known as "Facilities and Administrative," or F&A, costs).**

*Indirect costs* means those costs incurred for a common or joint purpose benefitting more than one cost objective, and not readily assignable to the cost objectives specifically benefitted, without effort disproportionate to the results achieved.

**§1108.235 Institution of higher education.**

*Institution of higher education* has the meaning specified at 20 U.S.C. 1001.

**§1108.240 Intangible property.**

*Intangible property* means:

- (a) Property having no physical existence, such as trademarks, copyrights, patents and patent applications; and
- (b) Property such as loans, notes and other debt instruments, lease agreements, stock and other instruments of property ownership, whether the property is considered tangible or intangible.

**§1108.245 Local government.**

*Local government* means any unit of government within a State, including a:

- (a) County;
- (b) Borough;
- (c) Municipality;

- (d) City;
- (e) Town;
- (f) Township;
- (g) Parish;
- (h) Local public authority, including any public housing agency under the United States Housing Act of 1937;
- (i) Special district;
- (j) School district;
- (k) Intrastate district;
- (l) Council of governments, whether or not incorporated as a nonprofit corporation under State law; and
- (m) Any other agency or instrumentality of a multi-, regional, or intra-state or local government.

**§1108.250 Management decision.**

*Management decision* means a written decision issued to an audited entity by a DoD Component, another Federal agency that has audit or indirect cost cognizance or oversight responsibilities for the audited entity, or a recipient or subrecipient from which the audited entity received an award or subaward. The DoD Component, cognizant or oversight agency, recipient, or subrecipient issues the management decision to specify the corrective actions that are necessary after evaluating the audit findings and the audited entity's corrective action plan.

**§1108.255 Nonprocurement instrument.**

*Nonprocurement instrument* means a legal instrument other than a procurement contract that a DoD Component may award. Examples include an instrument of financial assistance, such as a grant or cooperative agreement, or an instrument of technical assistance, which provides services in lieu of money.

**§1108.260 Nonprofit organization.**

*Nonprofit organization* means any corporation, trust, association, cooperative, or other organization, not including an institution of higher education, that:

- (a) Is operated primarily for scientific, educational, service, charitable, or similar purposes in the public interest;
- (b) Is not organized primarily for profit; and
- (c) Uses net proceeds to maintain, improve, or expand the operations of the organization.

**§1108.265 Obligation.**

*Obligation* means:

- (a) When used in conjunction with a DoD Component's award, a legally binding agreement that will result in outlays, either immediately or in the future. Examples of actions through which a DoD Component incurs an obligation include the grants or agreements officer's signature of a grant, cooperative agreement, or technology investment agreement (or modification

of such an award) authorizing the recipient to use funds under the award.

(b) When used in conjunction with a recipient's or subrecipient's use of funds under an award or subaward, an order placed for property and services, a contract or subaward made, or a similar transaction, during a given period that requires payment during the same or a future period.

**§1108.270 Office of Management and Budget.**

*Office of Management and Budget* means the Executive Office of the President, United States Office of Management and Budget.

**§1108.275 Outlays.**

*Outlays* means "expenditures," as defined in this subpart.

**§1108.280 Participant support costs.**

*Participant support costs* means direct costs for items such as stipends or subsistence allowances, travel allowances, and registration fees paid to or on behalf of participants or trainees (but not employees) in connection with conferences or training projects.

**§1108.285 Period of performance.**

*Period of performance* means the time during which a recipient or subrecipient may incur new obligations to carry out the work authorized under an award or subaward, respectively.

**§1108.290 Personal property.**

*Personal property* means property other than real property. It may be tangible, having physical existence, or intangible, such as copyrights, patents, and securities.

**§1108.295 Principal investigator.**

*Principal investigator* means either:

(a) The single individual whom an organization that is carrying out a research project with DoD support designates as having an appropriate level of authority and responsibility for leading and directing the research intellectually and logistically, which includes the proper conduct of the research, the appropriate use of funds, and compliance with administrative requirements such as the submission of performance reports to DoD; or

(b) If the organization designates more than one individual as sharing that authority and responsibility, the individual within that group identified by the organization as the one with whom the DoD Component's program manager generally should communicate as the primary contact for scientific, technical, and related budgetary matters concerning the project (others within the group are "co-principal investigators," as defined in this subpart).

**§1108.298 Prior approval.**

*Prior approval* means written or electronic approval by a DoD grants or agreements officer evidencing prior consent.

When prior approval is required for an activity or expenditure that would result in a direct cost to a DoD award, the grants or agreements officer's signature on an award that includes the planned activity or expenditure in the scope of work or approved budget satisfies the requirement for prior approval. Otherwise, a recipient is required to obtain such approval after award.

**§1108.300 Procurement contract.**

*Procurement contract* means a legal instrument which, consistent with 31 U.S.C. 6303, reflects a relationship between the Federal Government and a State, a local government, or other recipient when the principal purpose of the instrument is to acquire property or services for the direct benefit or use of the Federal Government. A procurement contract is a prime-tier transaction and therefore distinct from a recipient's or subrecipient's "procurement transaction" or "contract" as defined in this subpart.

**§1108.305 Procurement transaction.**

*Procurement transaction* means a legal instrument by which a recipient or subrecipient purchases property or services it needs to carry out the project or program under its award or subaward, respectively. A procurement transaction is distinct both from "subaward" and "procurement contract," as those terms are defined in this subpart.

**§1108.310 Program income.**

*Program income* means gross income earned by a recipient or subrecipient that is directly generated by a supported activity or earned as a result of an award or subaward (during the period of performance unless the award or subaward specifies continuing requirements concerning disposition of program income after the end of that period).

(a) Program income includes, but is not limited to, income from:

(1) Fees for services performed;

(2) The use or rental of real or personal property for which the recipient or subrecipient is accountable under the award or subaward (whether acquired under the award or subaward, or other Federal awards from which accountability for the property was transferred);

(3) The sale of commodities or items fabricated under the award or subaward;

(4) License fees and royalties on patents and copyrights; and

(5) Payments of principal and interest on loans made with award or subaward funds.

(b) Program income does not include:

(1) Interest earned on advances of Federal funds;

(2) Proceeds from the sale of real property or equipment under the award; or

(3) Unless otherwise specified in Federal statute or regulation, or the terms and conditions of the award or subaward:

(i) Rebates, credits, discounts, and interest earned on any of them; or

(ii) Governmental revenues, taxes, special assessments, levies, fines, and similar revenues raised by the recipient or subrecipient.

**§1108.315 Project costs.**

*Project costs* means the total of:

(a) Allowable costs incurred under an award by the recipient, including costs of any subawards and contracts under the award; and

(b) Cost-sharing or matching contributions that are required under the award, which includes voluntary committed (but not voluntary uncommitted) contributions and the value of any third-party in-kind contributions.

**§1108.320 Property.**

*Property* means real property and personal property (equipment, supplies, intangible property, and debt instruments), unless stated otherwise.

**§1108.325 Real property.**

*Real property* means land, including land improvements, structures and appurtenances thereto, but excluding moveable machinery and equipment.

**§1108.330 Recipient.**

*Recipient* means an entity that receives an award directly from a DoD Component. The term does not include subrecipients.

**§1108.335 Research.**

*Research* means basic, applied, and advanced research.

**§1108.340 Simplified acquisition threshold.**

*Simplified acquisition threshold* means the dollar amount set by the Federal Acquisition Regulation at 48 CFR Subpart 2.1, which is adjusted periodically for inflation in accordance with 41 U.S.C. 1908.

**§1108.345 Small award.**

*Small award* means a DoD grant or cooperative agreement or a subaward with a total value over the life of the award that does not exceed the simplified acquisition threshold.

**§1108.350 State.**

*State*, for purposes of applying the administrative requirements in these regulations, means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, the

Commonwealth of the Northern Mariana Islands, and any agency or instrumentality thereof exclusive of local governments.

**§1108.355 Subaward.**

*Subaward* means a legal instrument by which a recipient or subrecipient at any tier transfers--for performance by an entity at the next lower tier--a portion of the substantive program for which the DoD Component made an award.

**§1108.360 Subrecipient.**

*Subrecipient* means an entity that receives a subaward.

**§1108.365 Supplies.**

*Supplies* means all tangible personal property, including computing devices, acquired under an award that does not meet the definition of equipment in this subpart.

**§1108.370 Suspension.**

*Suspension* means either:

(a) When used in the context of a specific award or subaward, the temporary withdrawal of authority for that recipient or subrecipient to obligate funds under the award or subaward, pending its taking corrective action or a decision to terminate the award or subaward.

(b) When used in the context of an entity, an action by a DoD Component's suspending official under 2 CFR part 1125, DoD's regulation implementing OMB guidance on nonprocurement debarment and suspension in 2 CFR part 180, to immediately exclude the

entity from participating in covered Federal Government transactions, pending completion of an investigation and any legal or debarment proceedings that ensue.

**§1108.375 Technology investment agreement.**

*Technology investment agreement* means one of a special class of assistance instruments used to increase involvement of commercial firms in defense research programs and for other purposes related to integration of the commercial and defense sectors of the nation's technology and industrial base. Technology investment agreements include one kind of cooperative agreement with provisions tailored for involving commercial firms, as well as one kind of assistance transaction other than a grant or cooperative agreement. Technology investment agreements are subject to, and described more fully in, 32 CFR part 37.

**§1108.380 Termination.**

*Termination* means the ending of an award or subaward, in whole or in part, at any time prior to the planned end of period of performance.

**§1108.385 Third-party in-kind contribution.**

*Third-party in-kind contribution* means the value of a non-cash contribution (i.e., property or services) that:

(a) A non-Federal third party contributes, without charge, either to a recipient or subrecipient at any tier under a DoD Component's award; and

(b) Is identified and included in the approved budget of the DoD Component's award, as a contribution being used toward meeting the award's cost-sharing or matching requirement (which includes voluntary committed, but not voluntary uncommitted, contributions).

**§1108.390 Total value.**

*Total value* of a DoD grant, cooperative agreement, or TIA means the total amount of costs that are currently expected to be charged to the award over its life, which includes amounts for:

(a) The Federal share and any non-Federal cost sharing or matching required under the award; and

(b) Any options, even if not yet exercised, for which the costs have been established in the award.

**§1108.395 Unique entity identifier.**

*Unique entity identifier* means the identifier required for System for Award Management registration to uniquely identify entities with which the Federal Government does business (currently the Dun and Bradstreet Data Universal Numbering System, or DUNS, number).

**§1108.400 Unobligated balance.**

*Unobligated balance* means the amount of funds under an award or subaward that the recipient or subrecipient has not obligated. The amount is computed by subtracting the cumulative amount of the recipient's or subrecipient's unliquidated obligations and expenditures of funds from the cumulative amount of funds that it was authorized to obligate under the award or subaward.

**§1108.405 Voluntary (committed or uncommitted) cost sharing.**

(a) *Voluntary cost sharing* means cost sharing that an entity pledges voluntarily in its application (i.e., not due to a stated cost-sharing requirement in the notice of funding opportunity to which the entity's application responds).

(b) *Voluntary committed cost sharing* means voluntary cost sharing that a DoD Component accepts through inclusion in the approved budget for the project or program and as a binding requirement of the terms and conditions of the award made to the entity in response to its application.

(c) *Voluntary uncommitted cost sharing* means voluntary cost sharing that does not meet the criteria in paragraph (b) of this section.

**§1108.410 Working capital advance.**

*Working capital advance* means a payment method under which funds are advanced to a recipient or subrecipient to cover its estimated disbursement needs for a given initial period, after

which the DoD component making the award makes payment to the recipient or subrecipient by way of reimbursement.

## **Appendix A to Part 1108—Background on Assistance, Acquisition, and Terms for Types of Legal Instruments**

### **I. Purpose of This Appendix**

This appendix provides background intended to clarify some terms:

A. That are used in this chapter to describe either types of legal instruments that DoD Components, recipients, and subrecipients issue, or the purposes for which those types of instruments are used; and

B. For which this part provides definitions that vary depending on the context within which the terms are used.

### **II. Why Definitions of Some Terms are Context-Dependent**

A. The DoDGARs contain both:

1. Direction to DoD Components concerning their award of grants and cooperative agreements at the prime tier; and

2. Terms and conditions that DoD Components include in their grants and cooperative agreements to specify the Government's and recipients' rights and responsibilities, including post-award requirements with which recipients' actions must comply.

B. In some cases, the same defined term or two closely related terms are used in relation to both DoD Component actions at the prime tier and recipient or subrecipient actions at lower tiers under DoD Components' awards. But a given defined term may have meanings that differ at the two tiers. For example, in part because the Federal Grant and Cooperative Agreement Act applies to DoD Component actions at the prime tier but not to recipient or subrecipient actions at lower tiers (see sections III and IV of this appendix):

1. The terms "acquire" and "acquisition" do not have precisely the same meaning in conjunction with actions at the prime and lower tiers.

2. The meaning of the term "procurement contract" used to describe DoD Component prime-tier actions is not precisely the same as the meaning of "procurement transaction" or "contract" used to describe recipient or subrecipient actions at lower tiers.

### **III. Background: Distinguishing Prime-Tier Relationships and Legal Instruments**

A. The Federal Grant and Cooperative Agreement Act (31 U.S.C. chapter 63) specifies that the type of legal instrument a DoD Component is to use is based on the nature of the relationship between the DoD Component and the recipient.

B. Specifically, except where another statute authorizes DoD to do otherwise, 31 U.S.C. chapter 63 specifies use of:

1. A procurement contract as the legal instrument reflecting a relationship between a DoD Component and a recipient when the principal purpose of the relationship is to acquire property or services for the direct benefit or use of the Federal Government.

2. A grant or cooperative agreement as the legal instrument reflecting a relationship between those two parties when the principal purpose of the relationship is to transfer a thing of value to the recipient to carry out a public purpose of support or stimulation authorized by Federal statute.

C. The terms "acquisition" and "assistance" are defined in this part to correspond to the principal purposes described in paragraphs III.B.1 and 2 of this section, respectively. Using those terms, paragraphs III.B.1 and B.2 may be restated to say that grants and cooperative agreements are assistance instruments that DoD Components use, as distinct from procurement contracts they use for acquisition.

#### **IV. Background: Distinguishing Types of Recipients' and Subrecipients' Instruments**

A. While the Federal Grant and Cooperative Agreement Act applies to Federal agencies, it does not govern types of

instruments that recipients and subrecipients of any tier use. That statute does not require a recipient or subrecipient to:

1. Consider any instrument it makes at a lower tier under a Federal assistance award to be a grant or cooperative agreement. Therefore, at its option, a recipient or subrecipient may consider all of its lower-tier instruments to be "contracts."

2. Associate an "assistance" relationship, as that term is defined in this part and used in this chapter, with any lower-tier transaction that it makes.

B. However, the DoDGARs in this chapter do distinguish between two classes of lower-tier transactions that recipients and subrecipients make: subawards and procurement transactions. The distinction promotes uniformity in requirements for lower-tier transactions under DoD grants and cooperative agreements. It is based on a long-standing distinction in OMB guidance to Federal agencies, currently at 2 CFR part 200, which DoD implements in this chapter.

C. The distinction between a subaward and procurement transaction is based on the primary purpose of that transaction.

1. The transaction is a subaward if a recipient or subrecipient enters into it with another entity at the next lower tier in order to transfer--for performance by that lower-tier entity--a portion of the substantive program for

which the DoD grant or cooperative agreement provided financial assistance to the recipient. Because the Federal Grant and Cooperative Agreement Act does not apply to the recipient or subrecipient, it may make a subaward as defined in this part using an instrument that it considers a contract.

2. The transaction is a procurement transaction if the recipient or subrecipient enters into it in order to purchase goods or services from the lower-tier entity that the recipient or subrecipient needs to perform its portion of the substantive program supported by the DoD award.

Dated: July 24, 2020.

Aaron T. Siegel,  
Alternate OSD Federal Register Liaison Officer,  
Department of Defense.

[FR Doc. 2020-16409 Filed: 8/18/2020 8:45 am; Publication Date: 8/19/2020]